No. 13096

IN THE

United States Court of Appeals

For the Ninth Circuit

EUGENE B. SMITH & CO., INC., a corporation,

Appellant,

vs.

ELOY GIN CORPORATION, a corporation, and HOME INSURANCE COMPANY, a corporation,

Appellees.

BRIEF OF APPELLEE, ELOY GIN CORPORATION

EVANS, HULL, KITCHEL & JENCKES
JOS. S. JENCKES, JR.

807 Title & Trust Building
Phoenix, Arizona

Attorneys for Appellee,
Eloy Gin Corporation.

McGREW PRINTERY, PHOENIX, ARIZONA

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Page

Cases

Texts

IN THE

United States
Court of Appeals
For the Ninth Circuit

EUGENE B. SMITH & CO., INC., a corporation,

Appellant,

vs.

ELOY GIN CORPORATION, a corporation, and HOME INSURANCE COMPANY, a corporation,

Appellees.

No. 13096

BRIEF OF APPELLEE, ELOY GIN CORPORATION

STATEMENT OF THE CASE

The "Statement of the Case" contained in Appellant's brief appears to be fair. Any additional facts which we deem pertinent will be adverted to in our argument. We will deal with each specification of error submitted by appellant but not in the order presented. Our purpose will be to show in logical order why, under any view of the facts, the trial court would not have been warranted in entering judgment against Eloy Gin Corporation. As did counsel for appellant, we will, for purposes of convenience, refer to appellant Eugene B.

Smith & Co., Inc., as "Smith", to its insurance carrier, National Fire Insurance Company as "National", to appellee Eloy Gin Corporation as "Eloy", and to appellee Home Insurance Company as "Home".

SUMMARY OF ARGUMENT

I.

Eloy was not obligated to maintain fire insurance on Smith's cotton at the time the same was destroyed by fire. (Appellant's points 2 and 3.)

II.

Smith has no right of action against Eloy to the benefits of which National is entitled upon the theory of subrogation. (Appellant's point 1.)

III.

Smith, for itself or National, has no right of action against Eloy growing out of Eloy's failure to collect and remit proceeds of the Home policy. (Appellant's points 1 and 3.)

IV.

The custom of the trade with respect to gin charges for storage or insurance is immaterial and irrelevant. (Appellant's point 4.)

ARGUMENT

I. ELOY NOT OBLIGATED TO INSURE. (Appellant's points 2 and 3)

Counsel for Smith tactily concede that under the terms of the purchase contract between Smith and Eloy—"Insurance at seller's risk until payment completed."—Eloy assumed no obligation to insure the

cotton after payment. Counsel argue that the gin receipts issued by Eloy constituted new agreements between the parties which changed Eloy's obligation in this respect.

The court will bear in mind that the relationship between Eloy and Smith was that of vendor and purchaser. To facilitate the sale it was agreed that payment for the cotton would be made by "sight draft, gin-yard receipts attached." (T.R. 74) As cotton was ginned Eloy issued to itself yard receipts (T.R. 77). This, of course, created no obligation to anyone and was not so intended. It was merely a convenient method of identifying each bale of cotton. Obviously, Eloy had no intention of charging itself for storage and insurance and therefore the receipts were not completed with respect thereto. As Smith paid for the cotton, Eloy delivered the receipts to him pursuant to the original agreement. Presumably Smith was taking delivery "in lots of not less than 100 B/C, as fast as ginned and cards obtained." (T.R. 74). Between the time any receipt was delivered to Smith and the time that he surrendered the same upon receiving the bale of cotton identified by such receipt, Eloy was acting (as would any other vendor under like circumstances) as a gratuitous bailee. The reference to insurance in the receipts could not be deemed to impose upon Eloy a duty to insure or keep the cotton insured for any period of time subsequent to payment for the reasons: (a) the original agreement between the parties was to the contrary; (b) the receipts were not completed as to storage and insurance charges; (c) there was no intent to vary the terms of the original agreement; and (d) there was no consideration for any commitment by Eloy to insure.

Had the parties intended that Eloy would, for a consideration, act as a warehouseman of Smith's cotton and assume all obligations implicit in its warehouse receipts, Eloy would have issued and Smith would have accepted receipts requiring Smith to pay storage and insurance charges. The circumstances of this case lead only to the conclusion that Eloy was, as a vendor, holding cotton (the title to which had passed to Smith) pending delivery pursuant to the agreement of purchase and sale. The rights of the parties must be determined in the light of that agreement. It cannot be reasonably contended that such agreement imposed any obligation upon Eloy to maintain insurance on the cotton after receipt of payment.

II. NO RIGHT OF SUBROGATION.
(Appellant's point 1)

If we assume that Eloy was obligated to insure Smith's cotton and failed so to do, it is nevertheless undisputed that Smith did so himself. Smith is in exactly the same position as the intervener, W. D. Striplin, in the case of *Harwood-Yancey Co.* v. *Lawrenceburg Warehouse Co.,* 167 Tenn. 14, 65 S.W. 2d 192; cert. den. 292 U.S. 645, 78 L. ed. 1496; 54 S.Ct. 779. The court said:

> "After the destruction of his cotton aforesaid, W. D. Striplin received a sum of money equivalent to its value from his general insurer. This sum of money was paid to W. D. Striplin in pursuance of a written obligation on his part to treat said sum as a loan to be repaid, however, only upon the collection by him of damages for the loss of his cotton from defendant. This paper writing also contained an assignment to his insurer of the intervener's claim against defendant and agreement on intervener's part to make claim against defendant for the loss of the cotton and, in the event of failure to promptly collect to enter suit for said

claim against said defendant and to conduct said suit under the direction and advice of the insurer.

"We think the Court of Appeals properly dismissed the intervening petition of W. D. Striplin upon authority of Lancaster Mills v. Merchants' Cotton-Press Co., 89 Tenn. 1, 14 S.W. 317, 331, 24 Am. St. Rep. 586, and Deming & Co. v. Merchants' Cotton-Press Co., 90 Tenn. 306, 17 S.W. 89, 13 L. R. A. 518.

"The situation presented in those cases was this: The defendant had undertaken to keep the cotton fully insured. This agreement was breached. The cotton was destroyed by fire. The owners of the cotton, carrying general policies on all their cotton, received from their insurers amounts equivalent to their losses; these sums being received under the guise or form of loans as here. This court treated the loans as payments by the owners' general insurers and pointed out that the defendants in those cases were not liable primarily for the destruction of the cotton but were only liable for a breach of their contract to insure the cotton. It was said:

" 'As the assured did for itself just what the compress company agreed to do for it, and having no right of action save for premiums, its insurer, who has paid the loss, has none.' Lancaster Mills v. Merchants' Motton-Press Co., supra.

A like conclusion was reached in Deming v. Merchants' Cotton-Press Co., supra.

"While the court in those cases treated the so-called loans by the owners' insurers as payments, it does not seem to be material whether the action of the intervener's insurer here in placing in the owners' hands a sum of money equivalent to the loss be treated as a payment or as a loan. There was to be no repayment by the owner to the insurer unless there was recovery from the warehouse company. The intervener had no right of action against the warehouse company for the value of the goods.

His right of action was for a breach of contract on the part of the latter to insure the cotton. For such breach the warehouse company was liable for damage sustained by the intervener. He has sustained no damage except the cost of the premium on the policy issued by his general insurer. As long as he retains the sum of money received from his insurer, the intervener has no right of action against the warehouse company for lack of insurance. There is then, as said in the previous decisions, no right of action to which the intervener's insurer could be subrogated, save a suit for the amount of the premium aforesaid.

"We do not regard Luckenbach v. McCahan Sugar Refining Co., 248 U.S. 139, 39 S. Ct. 53, 54, 63 L. Ed. 170, 1 A.L.R. 1522, as in conflict with the former decisions of this court. In that case there was a primary liability on the part of the carrier for the value of goods lost through its negligence. * * * "

As pointed out by the Supreme Court of Tennessee, the case of *Luckenbach* v. *W. J. McCahan Sugar Refining Co.,* 248 U.S. 139, 63 L. Ed. 170, 39 S. Ct. 53, 1 A.L.R. 1522, relied upon by appellant, is authority only for the proposition that an insurer who has paid a claim may be subrogated to the rights of the insured against a person who is primarily responsible for the loss. Here Eloy is not charged with liability for a loss growing out of its negligence. It is merely charged with breach of contract which resulted in no damage to Smith.

III. NO CAUSE OF ACTION FOR FAILURE TO COLLECT INSURANCE PROCEEDS.
(Appellant's point 3)

If we further assume that Eloy was obligated to insure and that the Home insurance policy covered Smith's cotton, then counsel for appellant contend that Smith has a cause of action against Eloy because

of its failure to collect the proceeds and remit to Smith. It seems obvious that if Smith has no cause of action for Eloy's alleged *failure* to obtain insurance, then *a fortiori* no cause of action could arise out of Eloy's *obtaining* the insurance. In each case the answer is that Smith has suffered no loss. Smith has been indemnified by National (whether as a loan or payment is immaterial), and no right of subrogation exists in the absence of Eloy's liability for the loss arising from negligence.

In the case of *Friedman* v. *Woods Motor Vehicle Co.* (CCA 7) 123 Fed. 413, the Seventh Circuit held that:

> "The owner of goods, destroyed by fire while in storage with other goods owned by the warehouseman, is not entitled to recover a portion of the insurance collected by the warehouseman on general policies covering all goods for which he was liable, without showing that he has not been indemnified for the loss by other insurance."

In the case at bar it is undisputed that plaintiff has been indemnified by National. Under the circumstances it cannot recover herein for the reason—as stated by the Seventh Circuit: "The absence of other insurance is a condition upon which alone relief could be granted."

Counsel for appellant rely upon *Dixey* v. *Federal Compress & Warehouse Co.* (CCA 8) 132 F. 2d 275. In that case the warehouse company had insured the owner's cotton. Regulations issued by the Secretary of Agriculture imposed upon the warehouseman the duty of collecting the insurance proceeds, in the event of loss, and paying over the same to the owners. The warehouseman failed to do so and the action was instituted by the owner after its insurance carrier had paid for

the loss under a loan receipt similar to that involved in the case at bar. The court took the view that the owner had not received payment for his cotton and that the action would lie. The decision resulted from a misunderstanding of the scope and effect of the *Luckenbach* case. As pointed out by the Supreme Court of Tennessee in the *Harwood-Yancey* case, supra:

> "In Luckenbach v. McCahan Sugar Refining Co., the carrier, under a primary obligation for the loss of the goods, sought to escape that primary obligation by the device of inserting into its bill of lading a provision that it should have the benefit of any insurance effected. To meet this effort of the carrier, to keep the primary liability where the law placed it, the insurer adopted the loan device approved by the court. The decision of the Supreme Court sanctioned this effort of the insurer and the decision seems to rest largely on grounds of policy.
>
> "As heretofore pointed out, the situation of the parties in the case before us and the nature and order of their liabilities are altogether different." (65 S.W. 2d 196)

The *Dixey* decision did not result in a judgment against the warehouse company. Upon demand its insurer was named a party defendant and the court apportioned the loss equally between the two insurance companies. In the second opinion (*Dixey* v. *Federal Compress & Warehouse Co.* (CCA 8) 140 F. 2d 820, 822) the court stated with respect to plaintiff's contention that he should have had judgment against the warehouse company:

> "It is true that on the first appeal to this court we held that the plaintiffs had sufficiently pleaded a cause of action against the warehouse company for that company's refusal to take proper steps to

collect from its insurer. But after the remand that insurer was duly proceeded against and was compelled to respond to the extent of its liability. Therefore no damage accrued to plaintiffs from the mere refusal to proceed on the part of the warehouse company, originally relied on by plaintiffs. No negligence in respect to the fire was charged against the warehouse company and we find no merit in the first point argued."

In the case at bar, Eloy's insurer (Home Insurance Company) is a defendant. If Smith's insurer (National Fire Insurance Company) is entitled to contribution from Home, the latter can be compelled herein to respond to the extent of its liability. Under the circumstances, no action lies against Eloy.

Counsel for Home will contend that any right of action against it has been lost by reason of the failure of Smith, National, or Eloy to file proofs of loss and institute an action within the time limited by the policy (T.R. 80). If this contention be sustained, there is still no basis for imposing liability upon Eloy. There is nothing in the record to support the conclusion that Eloy prevented Smith from filing proofs of loss or instituting an action against Home within the proper time.

It is well settled that where an insurance policy covers bailor's goods, the bailor may, in the event of loss, sue the insurance company directly, particularly where the bailee fails or refuses to collect the proceeds on behalf of the bailor and even where the policies are payable to or adjustable with the bailee only.

Hamblet v. *Buffalo Library Garage Co., Inc.*
(S. Ct. N.Y.) 225 N.Y.S. 716

Insurance Co. of North America v. *U. S.*
(CCA 4) 159 F. 2d 699.

Millers National Ins. Co. v. *Bunds,*
158 Kans. 662, 149 P. 2d 350.

Richartz, et al. v. *Martin, et al.,*
252 Wis. 108, 31 N.W. 2d 158,

Anno. 61 A.L.R. 720.

If Smith was in a position to institute an action against Home, it cannot now charge Eloy with any loss which it may have sustained by reason of the failure of Eloy so to do. As pointed out in the Restatement of the Law of Contracts: "Damages are not recoverable for harm that the plaintiff should have foreseen and could have avoided by reasonable effort without undue risk, expense or humiliation" (A.L.I., 1 Contracts 535, paragraph 336). This principle is illustrated in the Restatement by the following exmple:

> "A contracts to obtain insurance for B against liability for injuries caused by B's automobile. With knowledge that A has broken his contract, B drives his automobile, injuries C, and has to pay heavy damages to C. B could easily have obtained such insurance from another agent before driving his machine. B's recoverable damages against A do not include the damages paid to C." (ibid. 538).

In the case at bar, Smith could easily have instituted the action against Home within the proper time and avoided any alleged loss.

We submit that in any event Home is not in a position to take advantage of the limitation contained in its policy. The undisputed evidence is that Home's agent (Mr. George K. Bolt of the General Adjustment Bureau), with full knowledge of the facts — and acting upon the advice of Home's attorney — prepared the proof of loss which was executed and presented by Eloy to Home (T.R. 139-141). Smith's cotton was

not included in the proof of loss because Home advised Eloy that it was not covered by the policy. Home made the decision that it was not liable for the loss of Smith's cotton and its attorney undertook to defend on behalf of both Eloy and Home when this action was instituted (T.R. 145-146). Under the circumstances, Home waived all conditions of the policy with respect to presentation of proofs of loss and institution of suit. It is well settled that a limitation in a policy as to the time when suit must be brought may be waived by the insurance company. Such waiver may be oral; it may also be either express or implied or the insurer by its conduct may be estopped from asserting the limitation. And such a waiver may be inferred from the acts of the insurer or its authorized representatives (20 Appleman, Insurance Law and Practice 326).

In the case of *Arlotte* v. *National Liberty Insurance Company,* 312 Pa. 442, 167 Atl. 295, the court held that an insurer was bound by its agent's representations that damage to an insured building was not covered by the policy and precluded the insurer from setting up as a defense insured's failure to furnish proof of loss or institute proceedings until a year after loss. In reliance upon the representations of Home's agent that Home was not liable for the loss of Smith's cotton, Eloy failed to take any further action in the matter. Under the circumstances, Home is not now in a position to rely upon the limitation contained in its policy.

IV. CUSTOM OF THE TRADE.
(Appellant's point 4)

Counsel for appellant argue that testimony as to the custom of the trade with respect to billing for insurance charges should have been admitted. It is apparently counsel's position that by reason of custom of the trade Smith was obligated to pay Eloy insurance

and storage charges accruing after the first twenty days of storage and that such obligation constituted consideration for Eloy's alleged promise to insure.

The lower court did not err in refusing to admit testimony as to the alleged custom of the trade with respect to billing for insurance charges. The testimony was wholly immaterial and irrelevant.

> " * * * A custom or usage will not be admitted where the evidence does not tend to show any intention on the part of the parties to contract with reference thereto and nothing can be gathered from the surrounding circumstances to lead to the conclusion that they did rely on it. * * *" 25 C.J.S. 110, Sec. 21.

As we have pointed out in subdivision I of this brief, all of the facts and circumstances surrounding the transaction between Smith and Eloy lead to the conclusion that there was no intent that Eloy, after payment for the cotton, should act as other than a gratuitous bailee. Eloy did not intend to charge Smith for storage and insurance and as a matter of fact made no such charge. Any question of custom and usage is completely beside the point.

CONCLUSION

This action was instituted solely and exclusively for the benefit of National. A judgment for or against Smith will not change its financial status one cent. It is an attempt by National to have another insurer (Home) bear or share the loss. Eloy was injected into the case purely as a tactical move. We submit that neither principles of law nor legal gymnastics require that Eloy shoulder a loss for which it is not alleged to be responsible and for which its vendee has been indemnified. Whether or not National may be entitled

to contribution from Home does not affect Eloy. Eloy is not guilty of any act or omission which has deprived National of any such right. Furthermore, it cannot be reasonably contended that Eloy was obligated at any time or in any way to National.

The lower court found that Eloy had no duty to maintain insurance upon Smith's cotton at the time it was destroyed and that National has indemnified Smith for its loss. Such findings are consonant with the evidence and will not be disturbed by this court. Such findings support the judgment for Eloy Gin Corporation which should be affirmed.

Respectfully submitted,

EVANS, HULL, KITCHEL & JENCKES

By: JOSEPH S. JENCKES, JR.

807 Title & Trust Building
Phoenix, Arizona

Attorneys for Appellee,
Eloy Gin Corporation.